No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

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KEVIN HALL, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

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On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Did the Ninth Circuit err by finding that Hobbs Act robbery is a "crime of violence" under *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020)?

2. Did the Ninth Circuit err by dismissing Mr. Hall's appeal without finding that Mr. Hall's prior 2007 conviction was not a crime of violence, leading to an additional criminal history point against him?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes**



**Other Authorities**

## I.

## PRAYER FOR RELIEF

Mr. Kevin Hall respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review part of its decision dismissing his appeal. The basis of this petition is that the Ninth Circuit erroneously dismissed his appeal issue as to whether Hobbs Act robbery is a crime of violence.

Hobbs Act robbery is not a crime of violence under 18 U.S.C. §924(c). Hobbs Act robbery is not a categorical match to the force clause of 18 U.S.C. §924(c). The Hobbs Act robbery statute is also overbroad, and indivisible. As Hobbs Act robbery should not have deemed a crime of violence, then Mr. Hall's conviction under Count Thirteen for Brandishing a Firearm During and Relation to a Crime of Violence should be vacated.

Mr. Hall was assessed an additional point in his criminal history score for his prior conviction containing a crime of violence. Said additional point assessment was improper because none of the charges in his prior conviction should have qualified him for an additional point for a crime of violence.

In the alternative, the Ninth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. This includes the recent decision in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), finding that attempted Hobbs Act robbery is a crime of violence.

## II.

## OPINION BELOW

A three-judge panel of the Ninth Circuit entered judgment in a memorandum that was final and unpublished, dismissing the appeal in light of an appeal waiver in Mr. Hall's plea agreement, as well as finding that Hobbs Act robbery was not a crime of violence. *United States v. Kevin Hall*, No. 17-10390 (9th Cir. October 28, 2020). *Appendix A.*

## III.

## BASIS FOR JURISDICTION

On October 28, 2020, a Panel of the Court of Appeals for the Ninth Circuit delivered an unpublished memorandum that dismissed Mr. Hall's appeal. *Appendix A.* This is the final judgment for which a writ of certiorari is sought. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## IV.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

Pursuant to Sections (3)(A) of Title 18 United States Code Section 924(c), a "crime of violence is an offense that is a felony and -

> has as an element the use, attempted use, or threatened use of physical force against the person or property of another...

Pursuant to Section (a) of Title 18 of United States Code Section 1951, also known as the "Hobbs Act:"

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

Section (b)(1) of Title 18 United States Code Section 1951 defines the term "robbery" for Hobbs Act purposes:

> The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

## V.

## STATEMENT OF THE CASE

### A. Jurisdiction of the Courts of First Instance.

The district court had jurisdiction under 18 U.S.C. § 3231. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

### B. Facts Material to the Questions Presented.

Mr. Hall's final superseding indictment filed on May 25, 2016 contained thirteen counts, including charges of Interference with Commerce by Robbery under 18 U.S.C. § 1951 and Use and Carry of a Firearm in Relation to a Crime of Violence pursuant to 18 U.S.C. § 924(c)(1)(A).

Mr. Hall pleaded guilty, with a plea agreement entered on April 19, 2017. Mr. Hall pleaded guilty to the following charges:

1. Count One for Conspiracy to Interfere with Commerce by Robbery pursuant to 18 U.S.C. § 1951,
2. Counts Six, Ten and Twelve for Interference with Commerce by Robbery pursuant to 18 U.S.C. §§ 1951 and 2, and
3. Count Thirteen for Brandishing a Firearm During and in Relation to a Crime of Violence pursuant to 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2.

Mr. Hall was sentenced on September 6, 2017. The district court sentenced Mr. Hall to, specifically seventy (70) months of custody as to Counts One, Six, Ten and Twelve, concurrent to one another, and eighty-four (84) months of custody as to Count Thirteen, consecutive to all of the other counts, for a total of one hundred fifty-four (154) months of custody.

## VI.

## REASONS SUPPORTING ALLOWANCE OF THE WRIT

This writ should be granted to allow this Court to correct the Ninth Circuit Panel's decision erroneously dismissing Mr. Hall's appeal. The Ninth Circuit erred by finding that Hobbs Act robbery is a crime of violence. Additionally, the Ninth Circuit erred by then finding that Mr. Hall's conviction and sentence under 18 U.S.C. § 924(c) were not unconstitutional. As these material points of fact were overlooked by the

Ninth Circuit, and by default the district court, it is respectfully requested that Mr. Hall's petition for writ of certiorari be granted.

### A. Mr. Hall's Conviction for Brandishing a Firearm During and in Relation to a Crime of Violence Should be Vacated When Hobbs Act Robbery Should is Not a "Crime of Violence" Under the "Force Clause."

The Ninth Circuit found that Mr. Hall's conviction for Brandishing a Firearm During an in Relation to a Crime of Violence was not unconstitutional pursuant to *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020). *Dominguez* held that attempted Hobbs Act Robbery was a crime of violence under the force clause. *Id.*, at 1262. *Dominguez* asserted that all of the "sister circuits" have found that Hobbs Act robbery is a crime of violence under the force clause. *Id.*, at 1261.

The underlying charge alleged to be a "crime of violence" is Hobbs Act robbery pursuant to 18 U.S.C. § 1951 ("Hobbs Act robbery"). "Robbery" under the Hobbs Act is defined as:

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of taking or obtaining.

18 U.S.C. § 1951(b)(1).

Under federal law, a person who uses or carries a firearm "during and in relation to any crime of violence" or who "possesses a firearm" "in furtherance of any such crime" may be convicted of both the underlying "crime of violence" and the additional

crime of utilizing a firearm in connection with a "crime of violence." 18 U.S.C. § 924(c)(1)(A). Section 924(c) prescribes a statutory mandatory minimum penalty on "any person who, during and in relation to any crime of violence…for which the person might be prosecuted in a court of the United States, uses or carries a firearm."

The statute later defines a "crime of violence" as any felony offense that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Courts refer to subsection (A) of § 924(c)(3) as the force clause, and to subsection (B) as the residual clause. *See United States v. Parnell*, 818 F.3d 974, 977 (9th Cir. 2016); and *United States v. Coronado*, 603 F.3d 706 (9th Cir. 2010). As the "residual clause" under 18 U.S.C. § 924(c)(3)(B) was invalidated by *United States v. Davis*, 139 S.Ct. 2319 (2019), the remaining consideration is whether Hobbs Act robbery qualifies under the "force clause" of 18 U.S.C. § 924(c)(3)(A). That is Hobbs Act robbery only qualifies as a "crime of violence" if the crime "has as an element the intentional use, attempted use, or threatened use of physical force against the person or property of another."

As *Dominguez* and the other circuit courts have not demonstrated, Hobbs Act robbery does not qualify as a "crime of violence." For whether a predicate offense qualifies as a crime of violence under § 924(c), courts apply the "categorical approach."

*United States v. Benally*, 843 F.3d 350, 352 (9th Cir. 2016). The categorical approach directs courts to "look only to the fact of conviction and the statutory definitions of the [predicate] offense, and not to the particular facts underlying those convictions." *United States v. Werle*, 815 F.3d 614, 618 (9th Cir. 2016). A crime "cannot categorically be a 'crime of violence' if the statute of conviction punishes any conduct not encompassed by the statutory definition of 'crime of violence.'" *Benally*, 843 F.3d at 352. "That is, [courts] consider whether the *elements of the offense* are of the type which would justify its inclusion within the sentence-enhancing category, without inquiring into the specific conduct of this particular offender." *United States v. Spencer*, 724 F.3d 1133, 1137 (9th Cir. 2013) (emphasis in original).

In order to satisfy the force clause, the "physical force" required to commit the predicate offense must be "violent force," or "force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). Violent physical force "connotes force strong enough to constitute 'power,'" i.e., a "substantial degree of force." *Johnson*, 559 U.S. at 140, 142.

So-called "violent" force suggests a "substantial degree of force." *United States v. Castlemen*, 134 S.Ct. 1405, 1410-1411 (2014) (explaining that "at common law, the element of force in the crime of battery was satisfied by even the slightest offense touching," which does not "necessarily entail[] violent force." This Court has, for example, previously held a state robbery statute did not satisfy the ACCA force clause where the state law provided "the degree of force is immaterial" so long as its

use was sufficient to obtain the victim's property "against his will." *United States v. Parnell*, 818 F.3d 974, 978-979 (9th Cir. 2016).

In *Johnson*, the Supreme Court analyzed the ACCA force clause—the pertinent parts of which are identical to § 924(c)'s force clause—by citing to sources that defined a violent felony as "[a] crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon." *Id.* at 140-41. Violent force therefore requires "strong physical force." *Id.* at 140.

The Supreme Court has held that the 'critical aspect' of a crime of violence is that it involves the use of physical force against another person. *United States v. Colon-Arreola*, 753 F.3d 841, 843 (9th Cir. 2014) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)). "Physical force" is "force capable of causing physical pain or injury," and includes "the amount of force necessary to overcome a victim's resistance." *Stokeling v. United States*, 139 S.Ct. 544, 553-55 (2019).

The Hobbs Act does not specify the *mens rea* a defendant must have when he or she threatens "force, or violence, or fear of injury." § 1951(b)(1). "'Use' requires 'active employment' and a 'higher degree of intent than negligent or merely accidental conduct'" *Id.* at 844 (quoting *Leocal*, 543 U.S. at 9). "Thus a crime may only qualify as a 'crime of violence' if the use of force is intentional." *Id.*

Hobbs Act robbery criminalizes the unlawful taking or obtaining of personal property by means of actual or *threatened* force. 18 U.S.C. § 1951(b)(1). Hobbs Act robbery does not require an offender to overcome the victim's resistance, and may be

committed solely by causing fear of injury – that is, by conveying a threat – and a threat does not itself constitute "force [] exerted to overcome the resistance encountered." *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019). Hobbs Act robbery does not qualify as a "crime of violence" when a defendant commits Hobbs Act robbery if he takes property by instilling "fear of injury" in the victim. § 1951(b)(1). At common law, a defendant satisfied the "fear" element of robbery if he made a "mere threat, unaccompanied by physical force, to accuse the property owner of the crime of sodomy." 3 LaFave, § 20.3(d)(2).

Hobbs Act robbery is also not a "crime of violence" when related robbery statutes indicate that recklessness is a sufficient *mens rea* to complete a Hobbs Act robbery. The federal bank robbery statute, for example, forbids taking property from a bank "by force and violence, or by intimidation." 18 U.S.C. § 2113(a). "Taking by intimidation is the willful taking in such a way as would place an ordinary person in fear of bodily harm." *United States v. Bungham*, 628 F.2d 548 (9th Cir. 1980). A specific intent by the defendant to intimidate is irrelevant. *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993). Intimidation in § 2113(a), in other words, is materially indistinguishable from instilling "fear of injury" in § 1951(b)(1). *See United States v. Howard*, 650 F. App'x 466, 468 (9th Cir. 2016) (unpublished) (noting that "'intimidation' … is defined as instilling fear of injury," for purposes of § 2113(a)). As a result, Hobbs Act robbery does not qualify categorically as a crime of violence under § 924(c)'s force clause.

Here, the "force" required by Hobbs Act robbery does not need to rise to the level

of "violent" physical force in order to meet the dictates of the statute. Force under Hobbs Act robbery can be accomplished through "threatened" instead of "actual" force or fear of injury. The act of robbery can be also done against property instead of a person. 18 U.S.C. § 1951(b)(1). A crime of violence is thus not demonstrated when a defendant can be convicted for a Hobbs Act robbery for using *de minimis* force or even for acting recklessly.

The *Dominguez* panel agreed that "[f]ear of injury is the least serious way to violate [Hobbs Act robbery], and therefore, the species of the crime that [it] should employ for [its] categorical analysis." *Dominguez*, 954 F.3d at 1260. But *Dominguez* focused its analysis on Hobbs Act robbery "committed by placing a victim in fear of bodily injury," which it found categorically qualifies as a crime of violence because "it 'requires at least an implicit threat to use the type of violent physical force necessary to meet the *Johnson* standard.'" *Id.* (quoting *United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017)).

The *Dominguez* panel did "not analyze whether the same would be true if the target were 'intangible economic interests because *Dominguez* fails to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest.'" *Id.* This ruling, which cites to *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) is erroneous, and conflicts with controlling precedent.

Despite the recent ruling in the Ninth Circuit in *Dominguez* as to attempted

Hobbs Act robbery, the completed crime of Hobbs Act robbery is not a crime of violence under 18 U.S.C. §924(c). Hobbs Act robbery is not a categorical match to the force clause of 18 U.S.C. §924(c). As Hobbs Act robbery should not have deemed a crime of violence, then Mr. Hall's conviction under Count Thirteen for Brandishing a Firearm During and Relation to a Crime of Violence should be vacated.

### B. Mr. Hall's Conviction for Brandishing a Firearm During and in Relation to a Crime of Violence Should be Vacated When the Hobbs Act Robbery Statute is Overbroad, and Indivisible.

The Hobbs Act prohibits "obstruct[ing], delay[ing], or affect[ing] commerce . . . by robbery." 18 U.S.C. § 1951(a). The statute defines "robbery" as:

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or **fear of injury, immediate or future, to his** person or **property**, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(b)(1) (emphasis added).

Where the statutory language itself includes conduct broader that the violent crime definition, "the inquiry is over" because the statute is facially overbroad. *Descamps v. United States*, 570 U.S. 254, 261 (2013). *Dominguez* conflicts with the Ninth Circuit's controlling *en banc* holding that when a "statute explicitly defines a crime more broadly" than a crime of violence definition, "no 'legal imagination' is required to hold that a realistic probability [of prosecution] exists" because the "statute's greater breadth is evident from its text." *United States v. Grisel*, 488 F.3d

844, 850 (9th Cir. 2007) (en banc), *abrogated on other grounds by United States v. Stitt*, 139 S. Ct. 399 (2018).

Recently, the Ninth Circuit reaffirmed *Grisel*, holding a "realistic probability" is shown "if a [] statute *expressly* defines a crime more broadly" than a crime of violence definition. *Lopez -Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020) (emphasis added) (finding plain language of Oregon's third-degree robbery statute rendered it categorically overbroad under 18 U.S.C. § 16(b)) (citing *Grisel*, 488 F.3d at 850); *see also United States v. Valdivia-Flores*, 876 F.3d 1201, 1208 (9th Cir. 2017) (finding plain language of Washington drug statute rendered it categorically overbroad under 18 U.S.C. § 16(b)) (citing *Grisel*, 488 F.3d at 850); *see also United States v. O'Connor*, 874 F.3d 1147, 1154 (10th Cir. 2017) (rejecting government's argument that defendant was required to "demonstrate that the government has or would prosecute threats to property as a Hobbs Act robbery" because the defendant "does not have to make that showing" under the categorical approach). Therefore, *Dominguez*'s attempt to require an actual prosecution is invalid due to the Hobbs Act's plain statutory overbreadth, as the *Dominguez* panel cannot overrule the controlling en banc precedent of *Grisel*. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (holding a three-judge panel cannot "overrule the decision of a prior panel of our court absent an en banc proceeding, or a demonstrable change in the underlying law").

Committing Hobbs Act robbery by causing fear of future injury to property (tangible or intangible) is broader conduct than the elements clause's requirement of

intentional violent force against a person or property of another. The plain language of Hobbs Act robbery criminalizes a threat of "injury, immediate *or future*, to his person or property." 18 U.S.C. § 1951(b)(1). Courts have recognized that, based on its plain language, Hobbs Act robbery can be committed by threats to property. *See, e.g., O'Connor*, 874 F.3d at 1158 (10th Cir. 2017) (holding that "Hobbs Act robbery criminalizes conduct involving threats to property," and that "Hobbs Act robbery reaches conduct directed at 'property' because the statute specifically says so") (citing 18 U.S.C. § 1951(b)(1)).

The plain language of Hobbs Act robbery does not require the use or threats of violent physical force, as defined by *Stokeling*, 139 S. Ct. at 554, to cause fear of future injury to property. *Leocal,* 543 U.S. at 9 ("When interpreting a statute, we must give words their 'ordinary or natural' meaning.")). Where the property in question is intangible, it can be injured without the use of any physical contact at all; in that context, the use of violent physical force would be an impossibility. A "fear of injury" to property includes not only a fear of future physical damage to property, but also a fear of future economic loss or damage to other intangible things. Other Circuits have long been in accord, interpreting "property" broadly to "protect intangible, as well as tangible, property." *United States v. Local 560 of the Int'l Bhd. of Teamsters,* 780 F.2d 267, 281 (3d Cir. 1986) (describing the Circuits as "unanimous" on this point).

The plain language of Hobbs Act robbery provides two further reasons why "fear of injury" does not encompass violent force. First, § 1951(b)(1) expressly sets forth

other alternative means: "actual or threatened force, or violence." But "[i]nterpreting 'fear of injury' as requiring the use or threat of violent physical force would render superfluous the other alternative means of committing Hobbs Act robbery." *Ratzlaf v. United States*, 510 U.S. 135, 140–41 (1994) ("Judges should hesitate…to treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense.")); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (citations and internal quotation marks omitted).

Second, intangible property by definition cannot be in the victim's physical custody or possession. This "preempts any argument that the fear of injury to property necessarily involves a fear of injury to the victim (or another person) by virtue of the property's proximity to the victim or another person." *United States v. Camp*, 903 F.3d 594, 602 (6th Cir. 2018) (noting that Hobbs Act robbery can be committed by "threats to property alone" and that such threats "whether immediate or future—do not necessarily create a danger to the person").

Hobbs Act robbery can thus be committed via threats of *future* harm to devalue an intangible economic interest. Such threats are not threats of physical force—let alone violent physical force against a person or property as required by § 924(c)'s elements clause. Thus, Hobbs Act robbery is overbroad.

Additionally, the *Dominguez* panel noted that 18 U.S.C. § 1951(a) is "divisible" because it contains two separate offenses, robbery and extortion, without conducting

any divisibility analysis. *Dominguez*, 954 F.3d at 1259, n.3. However, even if the predicate offense here is Hobbs Act robbery, rather than extortion, the Hobbs Act defines robbery in overbroad terms that are indivisible. *See United States v. Watson*, 881 F.3d 782, 784 (9th Cir. 2018) ("Because § 2113(a) is divisible with respect to [bank robbery and bank extortion] and [defendants] were convicted of the first offense, we need not decide whether bank extortion qualifies as a crime of violence."). Hobbs Act robbery is defined in 18 U.S.C. § 1951(b) as:

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, **by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property**, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(b)(1) (emphasis added). The listed means of committing robbery, "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property" are not divisible.

In *Descamps v. United States*, the Supreme Court narrowed the applicability of the modified categorical approach, clarifying it applies only if a defendant was convicted under a divisible statute. 570 U.S. 254, 263-64 (2013). A statute is "divisible" when it contains "multiple, alternative elements of functionally separate crimes." *United States v. Dixon*, 805 F.3d 1193, 1198 (9th Cir. 2015) (citation omitted). "A statute is not divisible merely because it is worded in the disjunctive." *Id.* (citation omitted). "[A] court must determine whether a disjunctively worded phrase supplies

'alternative elements,' which are essential to a jury's finding of guilt, or 'alternative means,' which are not." *Id.* (citation omitted).

The plain language of the Hobbs Act robbery statute establishes it is not divisible. The statute plainly lists the alternatives provided are "means," stating the offense is committed "*by means* of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1) (emphasis added). Accordingly, Hobbs Act robbery is not a "crime of violence" under the elements clause of § 924(c)(3)(A) because it is overbroad and indivisible and Mr. Hall's resulting conviction is unconstitutional and should be vacated.

### C. Mr. Hall Should Not Have Had Four Criminal History Points Assigned to Him for Prior Convictions That were Asserted as "Crimes of Violence."

Mr. Hall has one predicate felony offense that is reviewed for a potential qualification as a "crime of violence," a 2007 state of Nevada conviction for: (1) Conspiracy to Commit Robbery pursuant to Nevada Revised Statutes ("NRS") 199.480 and 200.380, (2) Robbery with Use of a Deadly Weapon pursuant to NRS 200.380 and 200.310, and (3) Second Degree Kidnapping pursuant to NRS 193.265, 200.310, and 200.330. Mr. Hall's 2007 conviction was assessed four total points: three points for a sentence of imprisonment exceeding one year and one month pursuant to U.S.S.G. § 4A1.1(a), and one point for:

> each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of 3 points for this subsection.

*See* U.S.S.G. § 4A1.1(e) (2017). Mr. Hall was assessed an additional criminal history point for a conviction of a crime of violence. At an offense level of 25, Mr. Hall's sentencing guideline range would have been between 63 and 78 months, and not between 70 and 87 months. *See* Sentencing Table (2017). Mr. Hall's sentence as to Counts One, Six, Ten and Twelve of seventy (70) months of custody affected Mr. Hall's substantial rights when seventy months is in the middle and not the low-end of the potential new Sentencing Guideline range. *See Molina-Martinez v. United States*, 136 S.Ct. 1338 (2016).

There is a two-part test to assess whether a prior conviction qualifies as a crime of violence. *United States v. Park*, 649 F.3d 1175, 1177–78 (9th Cir. 2011). First, the test is that the "conduct encompassed by the elements of the offense, in the ordinary case, must present a serious potential risk of physical injury to another." *Park*, 649 F.3d at 1177 (quoting *James v. United States*, 550 U.S. 192, 208 (2007)). Second, the prior offense must be "roughly similar, in kind as well as in degree of risk posed" to those enumerated at the beginning of the residual clause—burglary of a dwelling, arson, extortion, and crimes involving explosives. *Id.* at 1178. In the "similar in kind" analysis, we must determine whether the predicate offense involves "purposeful, violent, and aggressive conduct." *Begay v. United States*, 553 U.S. 137, 145 (2008). Under the test, Mr. Hall's prior 2007 conviction should not have qualified as a crime of violence.

a. *Mr. Hall's 2007 Conviction for Conspiracy to Commit Robbery and Robbery with Use of a Deadly Weapon is not a Crime of Violence.*

Under Nevada law, robbery is "the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property…" NRS 200.380. Nevada's robbery definition under NRS 200.380 contains broader terms than those of generic robbery. Said statutory language expands beyond the definition of having as an element the use, attempted use, or threatened use of physical force against the person of another. Further, NRS 200.380 tracks the language of the California version of robbery under Calif. Penal Code § 211, which was determined to not meet the definition of a violent felony in *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015).

Nevada robbery is also overbroad when compared to the generic definition of extortion. The commentary to the new §4B1.2 guideline defines extortion as "obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury." U.S.S.G. §4B1.2 comment. For example, non-violent threats and/or mere threats to property do not meet the U.S.S.G's new definition of extortion, although they may meet Nevada's definition of robbery. Threats to property, such as a demand for cash accompanied by a threat to scratch a car or break a window, are broader than the new definition of "extortion." Likewise, a threat to damage someone's reputation is not a threat of physical injury

and would not meet the generic definition of extortion.

b. *Mr. Hall's 2007 Conviction for Second Degree Kidnapping is not a Crime of Violence.*

Under Nevada law, Second Degree Kidnapping has degrees by which it is undertaken, with a category A felony for:

> [a] person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault, extortion or robbery upon or from the person, or for the purpose of killing the person or inflicting substantial bodily harm upon the person, or to exact from relatives, friends, or any other person any money or valuable thing for the return or disposition of the kidnapped person, and a person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor, or with the intent to hold the minor to unlawful service, or perpetrate upon the person of the minor any unlawful act is guilty of kidnapping in the first degree which is a category A felony.

*See* NRS 200.310(1) (2017). A category B felony for kidnapping under Nevada law is for:

> a person who willfully and without authority of law seizes, inveigles, takes, carries away or kidnaps another person with the intent to keep the person secretly imprisoned within the State, or for the purpose of conveying the person out of the State without authority of law, or in any manner held to service or detained against the person's will, is guilty of kidnapping in the second degree which is a category B felony.

*See* NRS 200.310(2) (2017). Nevada kidnapping is similar to 18 U.S.C. § 1201(a), where kidnapping occurs when one "seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person,

except in the case of a minor by the parent thereof[.]" *See* Ninth Circuit Model Jury Instruction 8.114 (listing as the first element of kidnapping that the defendant kidnapped, seized or confined the victim). The Nevada kidnapping statute appears to list multiple, alternative means of commission, rather than alternative elements. Mr. Hall's offense of kidnapping appears to be indivisible, and thus the categorical approach controls.

Nevada kidnapping does not categorically require violent force. Instead, the crime may be accomplished through non-physical means, such as by "inveigling" or "decoying." NRS 200.310(1); *see also United States v. Hughes*, 716 F.2d 234, 239 (4th Cir. 1983) (noting that a kidnapper may "use[] deceit and trickery to accomplish his purpose rather than overt force"); *see also United States v. Wills*, 234 F.3d 174, 177 (4th Cir. 2000). Because a violation of NRS 200.310(1) can be committed by means of fraud or deception instead of by force, it does not categorically include the "physical force" as an element of the offense necessary to qualify kidnapping as a "crime of violence." *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1127 (9th Cir. 2012).

Likewise, the requirement that the kidnapper "hold" the victim for ransom or reward does not categorically require physical force. As the Supreme Court has explained, "the act of holding a kidnapped person for a proscribed purpose necessarily implies an unlawful physical *or mental restraint* for an appreciable period against the person's will and with a willful intent so to confine the victim." *Chatwin v. United States*, 326 U.S. 455, 460 (1946) (emphasis added). Thus, the element of "holding" may

be fulfilled through non-forceful means such as "mental restraint." In some circumstances the victim need not even be aware of the restraint. *Id.*

In a pre-*Johnson* case entitled *United States v. Chandler*, 743 F.3d 648, 656 (9th Cir. 2014), the court reviewed the Nevada charge of kidnapping, under the ACCA's residual clause. The court in *Chandler* noted similarities of the Nevada kidnapping statute to the federal kidnapping statute, but also distinguished Nevada kidnapping from federal kidnapping within a footnote to the opinion, stating that it seems that Nevada second degree kidnapping "categorically presents a greater risk of force than the federal kidnapping statute." *Id.*, at fn 9. The court in *Chandler* held that kidnapping under Nevada law was categorically a "violent felony" under the residual clause of the ACCA, *id.*, at 657, which as is well known is now unconstitutionally vague following *Johnson*.

Kidnapping through fraud or coercion does not present a substantial risk that the defendant will use physical force against the victim in completing the offense. Kidnapping under Nevada law may be accomplished without the use of any physical force, and thus kidnapping does not categorically include "physical force" as an element of the crime. As a result, Mr. Hall's 2007 conviction for kidnapping does not categorically qualify as a crime of violence.

## VII.

## CONCLUSION

For the foregoing reasons, Mr. Kevin Hall respectfully asks this Court to grant this petition for writ of certiorari.

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Respectfully submitted,

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